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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

BRIEF FOR APPELLEES

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

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OCTOBER TERM, 1964.

No. 21

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees,

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

I.

Whether the three-judge District Court below correctly construed and properly applied § 1(18) of the Interstate Commerce Act, requiring Commission approval for an extension of railroad line, and § 1(22), exempting switching tracks from the Commissions § 1(18) authority, to the facts regarding the 262 foot crossover track connecting the Milwaukee and Ishpeming main lines and used solely for switching freight cars to be interchanged between them

and holding that the track is a § 1(22) switching track, not a § 1(18) extension of their respective lines of railroad, and therefore is outside the Commission's power under § 1(18) to permit or forbid.

II.

Was the proper function of the three-judge District Court below to construe § 1(22) of the Interstate Commerce Act, exempting construction of "spur, industrial, team, switching or side tracks" from the Commission's power under § 1(18) to permit or forbid, and notwithstanding the Commission's decision to the contrary, to decide that construction and operation of the 262 foot connecting track used only for switching interchange cars between the Milwaukee and the Ishpeming is not a § 1(18) extension of a line of railroad, but is within the ambit of § 1(22); or must a Federal court defer to the decision of the Interstate Commerce Commission that the connection is an extension of a line of railroad within its jurisdiction under § 1(18) of the Act?

STATEMENT OF THE CASE

This is a direct appeal under 28 U.S.C. § 1253 from the judgment of a three-judge District Court (R. 393) which set aside and annulled an order of the Interstate Commerce Commission (R. 314) denying an application under § 1(18) of the Interstate Commerce Act to continue interchange operations over a railroad track connecting the lines of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee" herein) and the Lake Superior and Ishpeming Railroad Company ("Ishpeming" herein).

A. The Connecting Track

On October 21, 1957, the Milwaukee and Ishpeming began interchanging freight cars over Republic Junction, a

new track connecting their main lines of railroad about two miles north of the town of Republic, in the Upper Peninsula of Michigan, where their rights of way are contiguous and parallel (R. 99, 385). The District Court described this connection as ". . . simply a crossover track between plaintiffs' respective railroads. It comprises two switches or turnouts, one in each of plaintiffs' lines, which are connected by 262 feet or approximately 0.05 miles of track." (R. 385, 294). This crossover is designated "A-C" on the plat of the interchange tracks (Applicants' Ex. 3; R. 228, 114).

In addition to the connection two side tracks, designated "D-E" on the plat of the interchange tracks were constructed parallel to the main line track of the Ishpeming (Applicants' Ex. 3; R. 228, 114, 294-295). These sidings are not essential to the connection and are irrelevant to this litigation. Their sole operational function, as the lower court noted (R. 385), is to provide tracks on which cars to be interchanged may be delivered by the Milwaukee or the Ishpeming and parked temporarily off of the main lines of both railroads until they are picked up by the carrier receiving them (R. 100-101) and to facilitate the various locomotive movements required for that operation (R. 295-296). Section 1(22) of the Interstate Commerce Act expressly exempts sidings from the requirements of § 1(18).

The cost of the new tracks was approximately $28,690.00 which was shared equally by the Milwaukee and Ishpeming (R. 101, 385) pursuant to a contract (Applicants' Ex. 4; R. 230, 231, 114).

B. The Litigation Preceding This Appeal.

On January 8, 1958, the Duluth, South Shore and Atlantic Railroad Company, now the Soo Line Railroad,

filed a complaint with the Interstate Commerce Commission alleging that the connection was an "extension" of the respective lines of railroad of the Milwaukee and Ishpeming and, therefore, that a § 1(18) certificate of public convenience and necessity was required for its construction and operation but had not been obtained prior thereto (R. 16). It requested the Commission to compel compliance by the Milwaukee and Ishpeming with §§ 1(18)-1 (22) of the Act (R. 20-21). This proceeding was docketed by the Commission as Finance Docket 20048.

As the lower court (R. 386) and the Commission (R. 293) correctly observed, appellees' answers averred that the connecting track was not an extension of a railroad line under § 1(18), but that it was a switching track within § 1(22) and, therefore, that the Commission had no jurisdiction over it.

To comply with a suggestion of the Commission and to obviate the substantial penalties which might be exacted in the event the Commission's suggestions were correct, the Milwaukee and Ishpeming jointly filed an application for a § 1(18) certificate of public convenience and necessity permitting continuance of their interchange operations over the connection (R.24). They also filed a motion to dismiss their application on the ground the track was not a § 1(18) extension, but within § 1(22) of the Act (R. 28). The Commission docketed the application proceedings as Finance Docket 20139. The North Western and the Duluth intervened in opposition to the application (R. 34-35, 35-36).

The Commission consolidated the complaint and application cases and, after hearing, entered its Report and Order on September 25, 1959 (R. 292-314), holding that the Republic Junction connection was an "extension" of appel-

lees' respective lines of railroad within the Commission's § 1(18) jurisdiction and overruling the motion to dismiss the application (R. 315). The Commission also found that public convenience and necessity did not require the connection and ordered appellees to cease operating over the interchange tracks (R. 313-314)

On May 17, 1960, after the Commission had denied a petition for reconsideration (R. 316), appellees sued in the lower court to review, and to annul, set aside and enjoin the enforcement of, the Commission's orders on the grounds that the connection was a § 1(22) track outside the Commission's jurisdiction and, if not, that the Commission's denial of the certificate applied for was contrary to the evidence of record (R. 1-12, 387). On June 13, 1960, after notice and hearing on appellees' motion (R. 333-334, 359-360), the three-Judge District Court issued a preliminary injunction (R. 365) preserving the *status quo* existent since the opening of the connection against any attempt to enforce the Commission's orders pending final disposition of the cause. Pursuant thereto the connection has remained open, and interchange operations thereover have continued.

On October 15, 1962, during the pendency of this litigation in the court below, the Commission on its own motion entered an order in the proceedings previously before it which, *inter alia,* discontinued the complaint case, Finance Docket 20018, and reaffirmed the Commission's previous orders in the application case, Finance Docket 20139 (R. 378-379).

By its decree of June 18, 1963 (R. 393-396), the three-Judge district court reversed, annulled and set aside the Commission's order on the basis of its opinion (R. 384-393) that the connection was not an "extension" within the pur-

view of a § 1(18) and, therefore, that the Commission had no jurisdiction to entertain the § 1(18) application. In so deciding the lower court did not reach the question whether the Commission's finding that a § 1(18) certificate was not required by public convenience and necessity was supported by evidence of record (R. 392).

SUMMARY OF ARGUMENT.

I.

Section 1(18) of the Interstate Commerce Act requires approval of the Interstate Commerce Commission prior to construction or operation of an "extension of a line of railroad"; § 1(22) exempts "switching tracks" from that requirement and thereby removes switching tracks from the § 1(18) jurisdiction of the Commission. *Western & Atlantic* v. *Public Comm.*, 267 U.S. 493, 497 (1925). A. Although the Commission correctly found on the evidence that the Republic Junction connection was a switching track by virtue of the operations conducted over it, the Commission misconstrued those sections of the Act by finding, contrary to its own precedent, that the connection was a § 1(18) extension. It should have found the track was a § 1(22) track and granted appellees' motion to dismiss the § 1(18) application. *St. Louis, S. F. & T. Ry. Co. Trackage Rights*, 267 I.C.C. 30 (1946).

B. 1. The North Western misconceives the effect of *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926) by arguing it controls the Commission's § 1(18) jurisdiction over the connection. It does not, because it held only that the Commission's jurisdiction was exclusive (a) where interstate commerce would be imperiled physically by the new operation and (b) to compel construction of new tracks under § 3(4) and § 1(21) of the Act, a power not applicable to the voluntary undertaking of appellees.

B. 2. The Government's Memorandum, as did the Commission's Report, incorrectly says the connection "invades" territory of the North Western and Soo Line under *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926). But, (a) not only do the facts of that decision distinguish it from Republic Junction, (b) not a single element held essential to such an invasion (c) is present in this litigation, because the connection neither goes anywhere served by the other railroads nor (d) can "invasion" under that decision occur elsewhere than at Republic Junction because it enables no railroad service which would not otherwise be available or which would tap sources of traffic exclusively served by other railroads.

C. Both the North Western and the Government contend that the competitive effects of the Connection make it a § 1(18) extension and place it within the Commission's power to permit or forbid. 1. This is not possible by means of trackage rights because neither the Milwaukee nor Ishpeming has acquired trackage rights over the other's railroad. For this reason trackage rights cases asserting Commission jurisdiction over connections implementing the use of trackage rights are not in point. 2. Nor do the new through routes over the connection make it an extension of line, because a § 1(18) extension must be a physical extension of track, not merely an arrangement for through transportation. Equating the two concepts would enlarge the Commission's power beyond that delegated to it by Congress. 3. Competition between railroads is not unlawful *per se*, and the economic injury, if any, to other railroads is a result of appellees' improvement of the transportation service they offer to the public, a concept radically different from an extension of a railroad.

On review the lower court acknowledge these distinctions between this case and the *Alabama* and *Texas*

decisions and the inapplicability of any theory based on competition. It correctly held the connection was a § 1(22) track because of the characteristics of the operations conducted over it and its relative insignificance.

II.

A. The North Western throughout its argument reiterates its view that the lower court proceeding was a *de novo* adjudication of whether the connection is a § 1(18) extension or a § 1(22) switching track, made without regard, or without sufficient regard, for the Commission's finding that the track is an extension. On the contrary, the litigation below constituted a review of the jurisdictional finding of the Commission on the record made before the Commission and with extensive consideration of the Commission's contentions as to its § 1(18) jurisdiction. The proceeding complied in every respect with the review the Court was required to make under § 10 of the Administrative Procedure Act, to correct an error of law made by the Commission. *Public Serv. Comm.* v. *United States*, 356 U.S. 421 (1958).

B. The North Western confuses undisputed evidentiary facts found by the Commission with the Commission's conclusion that it has § 1(18) jurisdiction over the connection. The same standards of judicial review do not apply to both; the Commission's jurisdictional conclusion may be questioned on review and the error of law on which it is grounded corrected. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943).

C. In any event, the question before the lower court whether Republic Junction is a § 1(18) extension or a § 1(22) switching track was one of statutory construction to ascertain which of those provisions applies to the un-

disputed physical facts found. Such an inquiry is clearly appropriate for a court. *Labor Board* v. *Highland Park Co.*, 341 U.S. 322 (1951). The North Western's argument that the Commission's finding as to its jurisdiction is conclusive was settled beyond doubt by this Court's rejection of similar arguments in *Texas & Pac. Ry.* v. *Gulf. Etc.*, 270 U.S. 266, 272 (1926), and *United States* v. *Idaho*, 298 U.S. 105, 109 (1936).

D. The Federal courts, not the Commission, are ultimately charged with the duty to define the Commission's jurisdiction regardless of the proper weight to be accorded the Commission's finding. *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956). A reviewing court may always question whether an agency has acted within the scope of its delegated powers.

E. *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177 (1938), relied upon by the North Western, is not in point because the Commission's determination therein was one of fact to serve as the basis for further administrative proceedings by another agency. The duty to make such a factual determination was delegated to the Commission by Congress in an Act other than the Interstate Commerce Act; it was not left for the courts to decide as is the question whether a track is a § 1(18) extension or a § 1(22) switching track. Determinations made under a different statute have no authorative weight in the decision of the question at bar.

III.

The outright reversal of the lower court requested by the North Western is improper because there remains another issue to be decided by the lower court in the event the judgment below is not affirmed.

ARGUMENT

I.

The Nature of the Connection Makes It, as the Lower Court Held, a § 1(22) "Switching Track" Exempt From the Jurisdiction Asserted Over It By the Commission Under § 1(18).

Section 1(18) of the Interstate Commerce Act, sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U.S.C. § 1(18), as amended,[1] requires a carrier undertaking an extension of its line of railroad by construction or acquisition to first obtain a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity requires it. Section 1(22) of the Act, enacted in the same section of the Transportation Act of 1920, 41 Stat. 478, 49 U.S.C. § 1(22) (Appendix A, page 3a), exempts from the Commission's § 1(18) authority ". . . the construction or abandonment of spur, industrial, team, switching or side tracks . . ." The question whether the Commission has § 1(18) jurisdiction over a track depends on whether the track is an "extension of a line of railroad" under § 1(18) or is within the purview of § 1(22). *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Western & Atlantic* v. *Public Comm.*, 267 U.S. 493, 497 (1925).

The crucial question now before this Court, as it was before the district court, is whether the Commission in its Report and Order (R. 292) properly assumed jurisdiction, on the ground the connection is a § 1(18) exten-

[1] The text of the relevant statutes cited herein are set out in Appendix A. Section 1(18) is at page 1a.

sion, to entertain and decide whether public convenience and necessity required the track. If so, the lower court may be reversed; but if, as we believe, the connection is a switching track within § 1(22), the Commission had no power to entertain and decide the public convenience and necessity question, and the judgment here appealed from should be affirmed.

A. The Commission Correctly Concluded That the Switching Operations Over the Connection Made It a Switching Track But Contradicted Itself By Assuming §1(18) Jurisdiction Over It

1. The District Court and the Commission Correctly Found That Only Switching Operations Were Conducted Over the Connection.

The record is replete with evidence that, as both the lower court (R. 389) and the Commission (R. 298) observed, the Republic Junction connection is used solely as a switching track for switching cars to be interchanged between the Milwaukee and Ishpeming. The Commission's Report and Order paraphrased witness Crippen's testimony (R. 100-101) describing the operations over the track (R. 295):

> "The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line whichever is more convenient."

The Milwaukee's southbound train performs a similar switching operation (R. 101, 295), and the Ishpeming's

trains operate in about the same manner but do not use the crossover (R. 131, 295-296).

The Commission recognized that this operation is, as the lower court held (R. 392), a switching operation and stated in its Report (R. 298): ". . . the physical movement of the cars from the line of one carrier to the other is, as contended by defendants, a switching movement . . ."

The Milwaukee locomotive uses the Ishpeming's main line track only for operational convenience and solely to return to the Milwaukee's main line after delivering cars on the interchange sidings in accordance with common railroad practice in switching interchange cars (R. 107-108). Such cars are not classified for delivery to their ultimate destination before placement on the interchange tracks; their only prior classification is for the limited purpose of delivery to the receiving railroad (R. 104-105).

Such an interchange operation is not a "train movement". A train is an engine and cars assembled and coupled together for a trip or run over a railroad, *United States* v. *Erie R. R.*, 237 U.S. 402, 407 (1915), and does not shift cars about in a yard or on isolated tracks devoted to switching operations, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U.S. 410, 412 (1915). No line haul movements are conducted over the connection; only switching movements to deliver or pick up interchange cars. Since no train moves from an origin point on the Milwaukee or Ishpeming via the connection to a destination point on the line of the other railroad, there is no through movement over the connection.

The record does not justify the Commission's finding that switching movements over the connecting track are actual parts of "the through movement of the traffic" (R.

298). The Commission found that the movements over the connection constitute a "mere switching operation" (R. 298). The connection itself, therefore, is no more than a "switching track" exempt, as the lower court held (R. 392), by the terms of § 1(22) from the Commission's § 1(18) jurisdiction. The short length of the connection (R. 294) and its nominal cost (R. 101) make it as insignificant as the district court held it to be (R. 391).

2. The Commission Disregarded Its Own Precedent By Holding the Connection Was a § 1(18) Extension.

Contrary to its finding that operations over Republic Junction are switching movements, the Commission assumed jurisdiction over the connecting track on the ground it was an "extension of line" within the Commission's § 1(18) power to permit or forbid. This assertion is pointedly contrary to Commission decisions exemplified by the cases cited below in which the Commission declined to take jurisdiction under § 1(18) because "switching operations" over proposed tracks constituted them "switching tracks".

Wisconsin Power & Light Co. v. *Chicago & N. W. Ry. Co.*, 220 I.C.C. 475 (1937), involved the power company's complaint to compel the North Western to establish a switching connection with an electric railway over which the power company already had trackage rights. The complaint alleged the North Western's refusal to connect violated §§ 1(9) and 3(3) of the Interstate Commerce Act, and the company also applied for a § 1(18) certificate permitting the connection. Although the Commission sustained the complaint, it dismissed the § 1(18) application on the ground the character of the connecting track did not place it within the purview of § 1(18).

In *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285 (1941), a § 1(18) certificate was applied for to authorize construction of connections 525 feet and 5,000 feet long, respectively, which with trackage rights over two other railroads would provide applicants a direct interchange connection with three railroads never before connected with them. Finding that the proposed trackage would expedite traffic movement, develop competitive routes, provide more dependable service, facilitate car interchange and eliminate using ferries to cross a river, the Commission described the tracks to be: ". . . for the sole purpose of conducting switching operations", 247 I.C.C. 291, and, dismissing the application, held that such use may be effected without Commission approval.

The Commission's Report in *Central R. Co. of New Jersey Trustees Acquisition*, 254 I.C.C. 344, 348 (1943), described an interchange operation over a proposed connecting track similar to the operation over Republic Junction which would eliminate a railroad from the route between applicants' lines. The Commission held it had no jurisdiction under § 1(18) because the connecting track was to be used only for switching service and was governed by the last sentence of § 1(18)[2] exempting from the Commission's authority contracts for the joint ownership or use of § 1(22) tracks (Appendix A, page 1a).

The moving of empty passenger equipment between a terminal station and applicant's coach yard on tracks of another railroad pursuant to a trackage rights agreement

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[2] Added to § 1(18) by sec. 4 of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 902, 49 U.S.C. § 1(18).

was characterized as "switching" in *St. Louis, S. F. & T. Ry. Co. Trackage Rights,* 267 I.C.C. 30, 36 (1946):

> "It seems clear that the use to be made by the applicant of the tracks of the Gulf Company is for a purely switching service within the Fort Worth terminal. Under such circumstances, and in view of the previous construction of the applicable provisions of the act, as shown above, it appears that we are not authorized to pass upon the question because such transactions are excluded from our jurisdiction."

The Commission accordingly dismissed the application for a § 1(18) certificate permitting operation over tracks of the Gulf Company.

Thus, to have been consistent with its declination of jurisdiction over connecting tracks used only for switching purposes, the Commission in this litigation, having recognized the operations over Republic Junction as "switching", should have refused to take jurisdiction over the connection and should have granted appellees' motion to dismiss their application (R. 28). The lower court's decision resolved the contradiction between the facts of record and the Commission's jurisdictional finding in a way, unlike the Commission's determination, wholly consistent with these Commission cases by holding that the connection, by the nature of the switching operations conducted thereover, was a § 1(22) switching track exempt from the Commission's § 1(18) jurisdiction.

3. Contrary To Appellant's View, No Settled Administrative Construction Supports the Commission's Jurisdiction Over the Connection.

The North Western argues on the authority of seven cases[3] (Appellant's Brief, pages 11-12) that consistent administrative interpretation by the Commission has settled the question of its § 1(18) jurisdiction over a connecting track. None of these decisions support appellant's contention because in none was the question of the Commission's jurisdiction raised by counsel or adjudicated by the Commission. The exercise of jurisdiction where it is not questioned or determined but has been passed *sub silentio* is not authoritative precedent. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 38 (1952); *Arant* v. *Lane,* 245 U.S. 166, 169-170 (1917). Because the proposition appellant seeks to support was not decided in those cases, they cannot be regarded as implications of an exercise of the Commission's authority assumed to be proper for a long period of time. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 307 (1962). If any established, consistent administrative determination of the Commission's power over a connection such as Republic Junction may be authoritative in the case at bar, it appears in the decisions cited at pages 13 and 14 hereof holding that tracks over which switching operations are conducted are outside the scope of the Commission's § 1(18) jurisdiction.

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[3] *Chicago, B. & Q. R. Co. Abandonment,* 267 I.C.C. 38 (1946); *Kansas City, M. & O. Ry. Co. of Texas Construction,* 224 I.C.C. 157 (1937); *Lucas County Farm Bureau* v. *Chicago, B. & Q. R. Co.,* 209 I.C.C. 489 (1935); *Charleston & W. C. Ry. Co. Construction,* 166 I.C.C. 707 (1930); *Construction By D., G. H. & M. Ry.,* 124 I.C.C. 338 (1927); *Operation By L. A. & S. L. R.R.,* 124 I.C.C. 207 (1927); *Construction By T., P. & W. R. R.,* 124 I.C.C. 278 (1927).

4. The Commission's § 1(18) Jurisdiction Over This Connection Would Authorize Its Jurisdiction Over Tracks Clearly Beyond Its Power To Permit or Forbid.

The fallacy of the Commission's contradictory decision that the connection is a § 1(18) extension based on its finding that movements over it are only switching operations is stressed by examples of trackage over which the Commission similarly could assume § 1(18) jurisdiction if Republic Junction is held to be a § 1(18) extension. Any "setting out" or parking of railroad cars on a sidetrack to be picked up later by another train could be characterized as "part of a through movement not incidental to a regular train movement" although the operations were conducted on a track in a railroad yard or picked up by a train of the same railroad for later interchange. Similarly, wherever cars should be picked up from a team track, moved to a railroad yard for classification and then transferred to another railroad which would carry them initially in a line haul movement, the Commission apparently would characterize the pick up and transfer operations as more than "incidental to a regular train movement." If the team track were connected, not to a main line track, but to a track in a classification yard, the Commission would so characterize the operation even though the regular train movement had not yet begun.

If the interchange switching over Republic Junction constitutes the connection an extension of a line of railroad within § 1(18), and not an exempt § 1(22) track, it follows that the Commission would have similar jurisdiction over a yard track to be used both for receiving cars delivered by another railroad and for storing loaded cars whose routing does not require interchange. Such tracks, however, are clearly within § 1(22) and beyond the Commission's power to permit or forbid.

Switching movements are essential to efficient, orderly railroad operations. Nevertheless, typical tracks on which switching occurs are incidental in comparison with, and by § 1(22) distinguishable from, the usually lengthy and expensive trackage required for line haul movements, trackage manifestly characteristic of the term "extension of a line of railroad" in § 1(18). A track on which cars are parked to be picked up by another train of the same railroad is a switching track by virtue of the switching operations conducted over it. Such a track acquires no different status if the cars are to be picked up by a different railroad.

B. The North Western and the Government Rely Principally Upon Two Inapposite Cases Which Cannot Support the Commission's Jurisdiction Over the Connection.

The North Western relies primarily on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), as authority for the Commission's assumption of § 1(18) jurisdiction over Republic Junction (Appellant's Brief, pages 10-16),[4] and the Government depends principally upon *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.* 270 U.S. 266 (1926). The facts deemed crucial by this Court in both of these cases are not analogous to Republic Junction, and the issues they decided are inapplicable to the issue decided by the lower court in the present litigation.

The *Alabama* decision held that the Commission's jurisdiction over the connection there in issue was necessary to assure the physical safety of interstate commerce; but the connection at Republic Junction poses no hazard to

[4] The Government also cites this decision at page 6 of its Memorandum, but the point it is intended to support is obscure.

traffic. This Court also confirmed the Commission's power, rather than a state's, to compel a junction between railroads; in the case at bar, however, the jurisdiction of the Commission to permit or forbid under § 1(18) of the Act, not its power to compel, was challenged. In the *Texas* case, the Commission's § 1(18) jurisdiction was rested on the fact the tracks there at bar invaded territory tributary to, and directly served by, another railroad. Republic Junction enables no such invasion. These basic facts conclusively distinguish these two decisions from the case at bar.

1. Alabama Ry. v. Jackson Ry. Is Not In Point.

The North Western argues that, since *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), held the Commission had exclusive jurisdiction over ". . . the establishment of junctions between the main lines of independent carriers. . .", 271 U.S. 250, the connection now before the Court is a § 1(18) extension of railroad line within the Commission's power to permit or forbid. This superficial "first blush" view of the *Alabama* case (Appellant's Brief, page 10) does not survive closer scrutiny.

The Commission also recognized the infirmity of this decision. Although the Recommended Report of the Commission's Examiner (R. 280-291) cites the *Alabama* case on this point (R. 286), the Report of the Interstate Commerce Commission (R. 292-314) avoids any reference to it.

The *Alabama* case stands for two propositions: (1) the Commission has jurisdiction over the construction of, or operations over, new railroad tracks if interstate commerce moving over them would physically be imperiled; and (2) the Commission's jurisdiction under § 3(4) and § 1(21) of the Interstate Commerce Act to compel the connection of one railroad with another over the objection of either or both is exclusive and precludes any such power of a state. Neither proposition is germane to this appeal.

a. In the Alabama Case the Commission's Jurisdiction Was Clear Because the Junction Imperiled Interstate Commerce, But No Such Element Is Present Here.

Alabama Ry. v. *Jackson Ry.*, 271 U.S. 244 (1926), turned on the fact that the connection sought by the Jackson and Eastern Railway would imperil interstate commerce. The Alabama successfully sued to enjoin eminent domain proceedings being prosecuted by the Jackson to condemn a junction at Curran's Crossing with the main line of the Alabama. The Supreme Court of Mississippi reversed, twice holding that the connection could be condemned at a safe place. 131 Miss. 857, 95 So. 733 (1922); 136 Miss. 726, 101 So. 553 (1924). This Court reversed on certiorari, deciding that if the Alabama's objections were well-founded, a junction where desired by the Jackson would obviously imperil interstate commerce and "The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, . . ." 271 U. S. 250.

Since the *Alabama* decision other cases similarly have held the Commission has exclusive jurisdiction over new tracks when operations thereover would interfere with interstate commerce. *Missouri Pac. R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 41 F. 2d 188 (C.A. 8, 1930), a suit under § 1(20) of the Act, which was enacted in sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(20), (Appendix A, pages 1a-2a), to enjoin construction without a certificate, decided that a proposed 3,700 foot track crossing the main line of the Rock Island to reach a new freight station was an extension on the ground, *inter*

alia,[5] that it would interfere with main line traffic on the Rock Island. *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C. A. 8, 1925), a similar § 1(20) action, concerned a 1,500 foot connection between the El Dorado and Missouri Pacific crossing the right of way and four tracks of the Rock Island which was held to be within the Commission's jurisdiction because it would interfere with the Rock Island's use of its track and terminal.

In *Re Quality Limestone Products, Inc.*, 41 Wis. Pub. Serv. Comm. 534, 536, 16 P.U.R.3d 205 (1956), cited by the North Western (Appellant's Brief, p. 13), the state commission held because a connection would be partially on a 2% to 3% grade and connect with a main line by a facing-point switch rather than a trailing-point switch,[6] that the safety of railroad operation was at issue and that the construction of the connection was within the Commission's jurisdiction to compel.

The record contains no evidence, and the Commission did not find, that the operations over Republic Junction are

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[5] The decision also held the new track was an extension under the rule of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), discussed herein at page 29 *et seq.* Safety of interstate commerce is not irrelevant because it was only one of several grounds for this decision. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 622-623 (1948).

[6] A junction with a main line at an obtuse angle in the direction from which main line trains approach requires a "facing-point" switch which, if aligned for the diverging route, would derail a train approaching at main line speed when it attempts to negotiate the sharp curvature of the switch. If such angle is acute, however, the switch is a "trailing-point" which, even if set for the diverging route, permits a train to move through it at speed, forcing the movable switch-points into alignment with the main line as the train passes.

dangerous to or jeopardize interstate commerce on either the Ishpeming or Milwaukee. The safety element and the interference factor which impelled the decisions in these cases are wholly absent from Republic Junction. The *Alabama* case and the others, consequently, are entirely inapposite to the case at bar.

b. The Commission's Authority Recognized In the Alabama Case Was to Compel Track Construction, Not to Permit or Forbid Voluntary Construction Like Republic Junction.

The question before the Court in *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), was not whether the connection there involved was one requiring a certificate of public convenience and necessity under § 1(18), but whether the connection could be compelled over the objections of the Alabama by eminent domain proceedings in a state court. Counsel for the Jackson asserted, as stated in the summary of argument before the Supreme Court of Mississippi at 131 Miss. 859, not set out in 95 So., that the Commission's power over railroad junctions is a power ". . . to determine the right of one railroad by compulsory proceedings to unite its track with the track of another railroad." The decision of this Court stated, at 271 U. S. 250:

> "The Commission's power under paragraph 3 of § 3 to require the establishment of connections between the main lines of carriers was asserted by it . . ."

Both this Court and the state court referred to the jurisdiction of the Interstate Commerce Commission to establish or require a connection, and it is this power, not the § 1(18) power to permit, which this Court held had been

exclusively conferred upon the Interstate Commerce Commission.

The Mississippi court so understood this Court's decision, and on motion for final judgment, 144 Miss. 702, 703, 110 So. 865 (1926), held that because the approval of the Interstate Commerce Commission had not yet been obtained ". . . the connection could not lawfully be coerced by the state court . . ." and made the injunction perpetual ". . . until such connection is ordered by the Interstate Commerce Commission."

The North Western infers far too much from the *Alabama* case. It is authority for the Commission's jurisdiction only over tracks which could not be built unless a reluctant railroad were compelled to accede to the desires of the proponent of the new trackage. No such coercion is needed when, as in the instant proceeding, the connection has been voluntary. Such a power over Republic Junction could compel only what already had been done by the Ishpeming and Milwaukee.

(1) The Power to Coerce Track Construction Asserted in the Alabama Case Derives From § 3(4) and § 1(21), Not From § 1(18) Which Governs Republic Junction.

The Commission's authority to compel railroads to connect with each other is delegated by § 1(21) or by the present § 3(4), formerly § 3(3), of the Interstate Commerce Act. *Interstate Commerce Comm.* v. *Los Angeles*, 280 U.S. 52, 64, 67 (1929). Both *Pittsburg & West Virginia Ry. Co.* v. *L. E., A. & W. R.R.*, 81 I.C.C. 333 (1923), and *Breckenridge Chamber Commerce* v. *W. F., R. & F. W. R.R. Co.*, 109 I.C.C. 81 (1926), dismissed complaints requesting the Commission to require connections between two railroads. Although its jurisdiction was

questioned in neither case, the Commission asserted its power to compel such tracks under the then § 3(3) of the Act, sec. 405 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 479, since renumbered § 3(4) by sec. 5(e) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 903, 49 U.S.C. § 3(4), (Appendix A, p. 3a).

The issue of the Commission's power to compel an interchange connection under § 3(3) of the Act was squarely raised in *Keyes Ry. Committee* v. *Beaver, M. & E. R. Co.*, 214 I.C.C. 526 (1936). In that case the committee desired a 365 foot connection between the tracks of two railroad systems at a point where their right of way adjoined. One railroad opposed the track and questioned the jurisdiction of the Commission to compel it under the then § 3(3). The Commission cited the *Alabama* case and held at 214 I.C.C. 527:

> "However, a switch connection between such systems, or between their subsidiaries, has been deemed a proper and reasonable facility for the interchange of traffic within the meaning of section 3(3), and it is within our power to order into effect such a connection where public convenience and necessity justify and require it."

The Commission's § 1(21) power supplements its § 3(4) authority. In *Los Angeles Passenger Terminal Cases*, 142 I.C.C. 489, 496-497 (1928), the Commission cited the *Pittsburg* and *Breckenridge* cases and *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), in support of its § 3(3) power to require establishment of a switch connection. A concurring opinion of Commissioner Eastman declared at 142 I.C.C. 499 that § 1(21) gave the Commission ample power to compel such a track and that such power stems both from § 3(3) and § 1(21). *City of Milwaukee* v. *Chicago*

& N.W. Ry. Co., 283 I.C.C. 311 (1951), confirmed Eastman's view by compelling under § 1(21) construction of a crossover track from a line of one railroad across the tracks of another to connect with the trackage of a harbor facility.

(2) The Commission's Power to Compel Is Not Coextensive With Its Power To Permit But Is Limited In Scope Compared To Its § 1(18) Powers.

The North Western's reliance on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), implies, although no attempt is made to show, that the Commission's power to compel under § 3(4) and § 1(21) is coextensive with its power to permit or forbid under § 1(18). Unless the scope of such power is the same under both, the two provisions cannot be construed to cover precisely the same kinds of railroad tracks, and § 1(22) cannot apply to § 1(21) with the same effect it applies to § 1(18).

This Court had occasion to contrast and compare § 1(21) with § 1(18) in *Interstate Commerce Comm.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 (1933), which denied the Commission's power to require a railroad under § 1(21), to construct a 185 mile extension of line through a sparsely settled area across 20 miles of swamp, 15 miles of alkali flats and 115 miles of desert at an estimated cost of about $10,000,000. Against a contention that the Commission's power to compel was unlimited, 288 U.S. 35, this Court observed that the legislative intent underlying § 1(18) was that in extending its existing facilities the free exercise of a railroad's discretion could not be permitted to drain its resources to the detriment of the public, while, on the other hand, § 1(21) refers primarily to car

service facilities and to extension of line only in amplification thereof. At 288 U.S. 37, the decision states:

> "The same principles and the same needs might equally require the building of a new line as the extension of an existing one, unless, indeed, Congress recognized a radical difference between compelling embarkation in a new venture and ordering a mere extension of facilities required as the natural concomitant and complement of those presently used for the rendition of the service to which the carrier has committed itself."

Expensive relocation of tracks incidental to establishment of a new union station can not be required by a state commission, but only by the Interstate Commerce Commission. *Railroad Commission* v. *Southern Pac. Co.*, 264 U.S. 331 (1924). In a subsequent appeal, *Interstate Commerce Comm.* v. *Los Angeles*, 280 U.S. 52, 67, 70 (1929), the Court held that the Commission's power under § 3(4) and § 1(21) to compel construction of connecting tracks and provide car-service facilities was limited to those requiring no unreasonable expense.

Section 1(10) of the Interstate Commerce Act, as amended and re-enacted by sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 476, 49 U.S.C. § 1(10), provides that "car service" includes ". . . the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars . . ." The exchange and interchange of cars between railroads must be via trackage connecting their lines; and the Commission's exclusive jurisdiction over car supply must include the power to compel such connections as a practical concomitant of its duty to insure an adequate car supply.

Because a § 1(18) extension of a railroad line is something more than a § 1(21) connection or car-service facility,

§ 1(21) does not in any way circumscribe § 1(22) in its relation to § 1(18). If a track is within § 1(22), the Commission's power under § 1(21) does not make it a § 1(18) extension. Because the *Alabama* case was a compulsion case, it confirmed the Commission's § 1(21) power but did not adjudicate the Commission's § 1(18) jurisdiction. Since this litigation concerns the Commission's power only under § 1(18), the *Alabama* decision is irrelevant.

(3) Appellant's Cases Justifying the Commission's Power to Compel Similarly Are Not In Point.

The North Western cites other decisions purporting to be authority for reversal of the lower court but which are subject to the same infirmity as *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926). *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N.W. 809 (1926), was a suit to compel the Great Northern and Milwaukee to construct an interchange connection between their lines which both railroads opposed. The state commission ordered the connection built over the Milwaukee's objection to its jurisdiction, and on appeal the state supreme court initially affirmed on the ground the state could compel the connection.

The *Pipestone* case was decided only a month before this Court decided the *Alabama* case, and on reargument, 167 Minn. 177, 213 N.W. 534 (1926), the Minnesota court set aside its previous opinion and held *Alabama* controlled and that the Interstate Commerce Commission had exclusive jurisdiction to compel connections between carriers unwilling to connect voluntarily.

In *Lucas County Farm Bureau* v. *Chicago, B. & Q. R. Co.*, 209 I.C.C. 489 (1935), the Bureau invoked the Commission's power to require the Burlington and Rock Island

railroads to connect their lines. The Commission dismissed the complaint, and the railroads were not required to build it. *Board of Administration* v. *Chicago, B. & Q. R. Co.*, 138 Kan. 720, 27 P.2d 550 (1933), concerned a petition to a state commission to require the Burlington and Rock Island to construct an interchange connection which the commission ordered built. On appeal the state trial court voided the order for lack of the commission's jurisdiction, and the state supreme court affirmed on the ground jurisdiction to compel such a connection was vested exclusively in the Interstate Commerce Commission.

Like *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), each of these three cases adjudicated only that the Commission had exclusive power to compel § 1(21) construction. They are similarly inapplicable to this § 1(18) litigation. Section 1(18) grants the Commission authority only to permit or forbid construction of railroad tracks on an application willingly prosecuted by the carrier or carriers undertaking the project voluntarily. *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, 273 (1926); *Powell* v. *United States*, 300 U.S. 276, 287 (1937). The Commission's § 1(18) power thus is no different than, for example, its power over railroad mergers, which it can permit if voluntary on the part of the railroads involved, but which it cannot initiate or coerce. *St. Joe Paper Co.* v. *Atl. Coast Line R. Co.*, 347 U.S. 298 (1954).

2. Contrary to the Commission's Report, the Lower Court Correctly Held the "Invasion" Doctrine of the Texas Case Did Not Make This Connection an Extension Within the Commission's Jurisdiction.

The Commission's Report (R. 296-298) and the Memorandum of the Government herein base their argument for the Commission's jurisdiction over Republic Junction

principally on *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), despite the inherent incompatibility of that case with this. Recognizing the limits of the "invasion" doctrine, the lower court held the *Texas* case could not apply to this connecting track because neither the Milwaukee nor the Ishpeming thereby were enabled to "invade" new territory or territory served by another railroad (R. 391, 392).

a. The Tracks In the Texas Case Were Extensive Enough To Be an Extension, But the Republic Junction Connection Is Not.

In the *Texas* case the Texas and Pacific Railway applied for an injunction under § 1(20) of the Interstate Commerce Act alleging that the Gulf, Colorado and Santa Fe Railway proposed to construct a 7.5 mile extension of line into an industrial area adjacent and naturally tributary to the Texas without first obtaining a § 1(18) certificate of public convenience and necessity. The Gulf denied the track was an extension of its line and declared it to be a § 1(22) industrial track exempt from the requirements of § 1(18) and the Commission's jurisdiction. *Lancaster* v. *Gulf, C. & S. F. Ry. Co.*, 298 Fed. 488 (S.D. Tex., 1924). The Texas had served industries in the area for many years while the Gulf had not. The project was to cost $510,000 for, not one track, but several: a "Y", four side tracks and five spur tracks in addition to the 7½ mile lead track. The district court held this elaborate complex of trackage was an extension.

On its facts alone, therefore, the *Texas* case is inapplicable to the 262 foot connection at Republic Junction which cost only $28,000 (R. 101, 385) and compromises a single track completely within appellees' adjoining rights

of way (R. 99, 385). The Commission's failure thus to compare the facts of the *Texas* case with those before it in this led to its erroneous reliance on the *Texas* case to support its alleged § 1(18) jurisdiction over this connection.

b. The Texas Case "Invasion Doctrine" Has Been Applied Only In the Presence of Factors Absent From Republic Junction.

On appeal, 4 F.2d 904 (C.A. 5, 1925), the court reversed the district court on the ground the proposed trackage came within the common meaning of "industrial tracks" on the authority of several decisions antedating the Transportation Act of 1920. This Court on writ of error reversed and held § 1(22) did not apply because the extensive new trackage would "invade" territory already served by the Texas and Pacific, which, as a result, would lose annual revenues of some $500,000 by diversion of traffic from it to the Gulf. The Court recognized that typically § 1(22) tracks are ordinarily inexpensive and are intended either to improve facilities required by shippers already served or to provide the same facilities to others and that the necessity for such tracks depends on local conditions within the prerogative of the states to regulate. Through Mr. Justice Brandeis the Court compared such tracks with the proposed trackage of the Gulf and held at 270 U.S. 278:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier; its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to

> secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

The effect of this decision was to require the Gulf to obtain a § 1(18) certificate from the Interstate Commerce Commission before proceeding with the project.

The invasion doctrine thus pronounced expressly indicates its own limitation in the quoted words of the Court. The invasion must be "substantial" as was the complicated and expensive undertaking in the *Texas* case. The trackage itself must reach into territory not previously served by the railroad constructing it, and the territory must already be served adequately by another carrier whose traffic thereby will be diverted to a considerable extent. A new or proposed track which, absent these characteristics might be exempt under § 1(22), by virtue of them becomes a § 1(18) extension under the *Texas* case.

Ten cases since the *Texas* case in which new tracks construction was alleged to be an "extension of railroad line" requiring a § 1(18) certificate because it invaded another carrier's territory, have held the new construction involved to be an extension within the Commission's § 1(18)

jurisdiction to permit or forbid on such ground.[7] In each of these, as in the *Texas* case, the determinative facts were that substantial new construction would itself physically reach into an area previously served by another carrier and, by providing service to shippers therein who had not previously been served by the invading carrier, divert traffic and revenue from the other railroads.

In contrast to the *Texas* case and the lower court decisions cited above holding that "invasion" makes a track a § 1(18) extension which otherwise would be within § 1(22), the lower courts uniformly have declined to find an "invasion" whenever it was shown that the trackage lacked the essential elements of the *Texas* case. Thus there was no invasion which would remove a proposed track from the exception of § 1(22) where the constructing railroad already had been holding itself out to serve the area allegedly invaded. *Detroit & Toledo Shore L. R. Co.* v. *New York Cent. R. Co.*, 233 F.2d 168 (C.A. 6, 1956); *Chicago, M., St. P. & P. R. Co.* v. *Chicago & E. I.*

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[7] *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F.2d 854 (C.A. 10, 1952); *Missouri Pac. R. Co.* v. *St. Louis Southwestern Ry. Co.*, 73 F.2d 21 (C.A. 8, 1934); *Missouri Pac. R. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 41 F.2d 188 (C.A. 8, 1930), certiorari denied, 282 U.S. 866; *New York Central R. Co.* v. *Norfolk & Western Ry. Co.*, 214 F. Supp. 549 (S.D.W.Va., 1963); *Chicago, Rock Island & Pac. R. Co.* v. *Chicago & N. W. Ry. Co.*, 188 F.Supp. 549 (S.D. Ill., 1960); *State of Georgia* v. *United States*, 156 F.Supp. 711 (N.D. Ga., 1957), affirmed *per curiam*, 356 U.S. 273 (1958); *Chicago, Rock Island & Pacific R. Co.* v. *Thompson*, 135 F.Supp. 43 (E.D. Ark., 1955); *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F.Supp. 710 (W.D. Wash., 1954), affirmed *per curiam*, 225 F.2d 840 (C.A. 9, 1955); *Pennsylvania R. Co.* v. *United States*, 40 F.2d 921 (W.D. Pa., 1930); *Chicago, R. I. & P. R. R. Co.* v. *Commerce Com.*, 414 Ill. 134, 111 N.E. 2d 136 (1953).

R. Co., 198 F.2d 8 (C.A. 7, 1952); *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F. Supp. 616 (E.D. Pa., 1955), affirmed *per curiam*, 226 F.2d 958 (C.A. 3, 1955); *Chicago Great Western Ry. Co.* v. *Jesse*, 249 Minn. 324, 82 N.W.2d 227 (1957). One cannot "invade" his own territory.

Similarly no invasion was recognized where the railroad alleging invasion was in no position to serve the area into which the new track would extend. *New York Central R. Co.* v. *Chicago & Eastern Ill. R. Co.*, 222 F.2d 828 (C.A. 7, 1955). One is not "invaded" unless the invader goes into his territory. Nor is there an "invasion" if the track would enable the constructing carrier to serve no additional or new shippers. *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F.2d 126 (D.Kan., 1931); *Missouri Pac. Rld. Co.* v. *Chicago Great Western Rld. Co.*, 137 Kan. 217, 19 P. 2d 484 (1933).

Unless a railroad's service to a particular shipper has become an established pattern, another railroad's construction of track to serve the shipper is not an invasion within the *Texas* doctrine, even though both railroads already compete for traffic from the general area. In *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768 (C.A. 5, 1949), the court held the new construction was a § 1(22) track because it tapped a source of traffic wholly new, not only to the constructing road, but to all railroads.

We commend these decisions to the Court as well-reasoned, practical expressions of the logical bounds of the invasion doctrine.

c. No "Invasion" Under the Texas Case Occurs at Republic Junction Because the Requisite Factors Are Absent.

The facts surrounding the Republic Junction connection distinguish it from the trackage before this Court in the *Texas* case and confirm that the Commission misapplied the invasion doctrine as the basis for assuming § 1(18) jurisdiction over it. The lower court perceived what the Commission failed to recognize in its Report, and what the Government still refuses to acknowledge: none of the considerations underlying the *Texas* decision pertain to the connection now before the Court.

A track 262 feet in length is hardly a substantial amount of trackage in terms of the *Texas* case, and an expenditure of $28,690 to construct such a short connection and two sidetracks is not substantial. Compared to the $510,000 cost of the Gulf's proposed trackage, it is no more than trivial.

Built entirely within the confines of appellees' adjoining rights of way (R. 99), the connection itself cannot "invade" any territory of another railroad. The nearest trackage of the Soo Line or North Western to Republic Junction are 6 and 9 miles, respectively, away, as is shown on the plat (Applicants' Ex. 2; R. 226, 114). Neither the Soo Line nor the North Western, of course, could serve the area adjacent to the connection.

No industries are naturally tributary to either the connecting track or the sidetracks, and the new trackage cannot itself provide railroad service to any shipper not served by the Milwaukee or Ishpeming prior to its construction or who would not be served by them in the absence of the connection.

Not a single essential element of the *Texas* case is present in this case on which the invasion doctrine can be

predicated. In contrast, each and every factor upon which lower courts have declined to apply that doctrine is characteristic of the new tracks here at issue. The invasion doctrine is manifestly irrelevant to this litigation.

d. Nor Does the Connection Cause "Invasion" Elsewhere Than at Republic Junction Because the Necessary Elements Are Similarly Not Present.

The Commission and United States, in their Memorandum, transgress these fundamental and determinative considerations. They reject the clear implication of the *Texas* case that "invasion" occurs only when the new tracks themselves physically extend into the allegedly invaded territory and argue that construction of the connection enabled an "invasion" miles away from Republic Junction. Any such effect is wholly illusory.

"Invasion" under the *Texas* case must be grounded upon the actual intrusion of ballast, ties and rail into new territory. These constitute "trackage", and in the *Texas* decision this Court specified: ". . . where the proposed trackage extends into territory. . ." *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 278 (1926). The Commission and Government thus neglect the plain meaning of the words by which this Court formulated the very doctrine here urged as reason for reversing the lower court. Not a single instance is suggested, and we know of none, where "invasion" was based upon other than such a physical intrusion of newly laid steel rail.

The Government's argument is not aided by avoiding the prerequisite of physical intrusion. Neither the Milwaukee nor the Ishpeming now serve any territory not served by them prior to the connection or which would not be served by them in the absence of the conection (R. 101). The Ishpeming obtained authority to serve Sunrise

Landing before the connecting track was constructed (R. 301); the Milwaukee has long served Amasa and Iron Mountain (R. 300, 301, 390) as the Commission admits (R. 400). No additional service to these points was initiated by means of the connecting track. The tracks being there in place, the Ishpeming and Milwaukee would continue to serve these stations as well without the connection as with it. They entered no new territory on account of it (R. 101, 391).

Nor did the connection enable its builders to provide new service to a single new shipper. No new spur, team or industrial tracks were constructed near or about the connection to initiate traffic which would not have moved on appellees' lines if the connection had never been built. The Milwaukee and Ishpeming were not by the new tracks enabled to provide service in any territory or to any shipper theretofore served by the Soo Line or North Western because neither of those railroads ever served Sunrise Landing (R. 301, 390-391).

The Milwaukee and North Western compete with each other for traffic originating on the Ishpeming (R. 301). The North Western obtains such traffic from the Ishpeming at Little Lake, Michigan (R. 301); the Milwaukee obtains it now at Republic Junction and formerly from the present Soo Line at Champion (R. 301, 389). This by no means is the sort of competition to which the doctrine of the *Texas* case applies. Where two railroads already compete with each other for traffic from a territory, one of them does not invade by building a new track into the area which, in such event, neither road has an exclusive right to serve. *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768, 770 (C.A. 5, 1949).

If, as contended by the North Western, it has lost traffic by reason of the connecting tracks, such loss was caused by improvement of the service and interchange facilities of the Ishpeming and Milwaukee, not by the invasion of any territory of either the Soo Line or North Western.

We have not claimed, because it seems to us unnecessary, that the jurisdiction of the Commission over Republic Junction was negated by more than the § 1(22) exemption. But even in the absence of that exemption, it is obviously doubtful the connection constitutes an "extension of lines" of either the Milwaukee or the Ishpeming within the meaning of § 1(18), since it enables neither the Milwaukee nor the Ishpeming to reach a single additional shipper or receiver of freight, nor is either railroad enabled to transport freight to or from any origin or destination which could not have been reached by them prior to the establishment of the connecting track.

C. Republic Junction Creates No Unlawful Competition With Appellant or Other Railroads.

The crux of the arguments of both the North Western and the Government is that the competitive effect on the North Western and Soo Line created by new through routes via Republic Junction from Ishpeming origins to destinations on the Milwaukee and its connections make Republic Junction an "extension of line." The argument is untenable.

1. No Trackage Rights Beyond the Connection Justify the Commission's Jurisdiction, and Trackage Rights Cases Cited by Appellant Are Irrelevant.

A railroad by contract may run its trains over the tracks of another railroad in lieu of using its own tracks or of building a new track. Such an arrangement may be an

extension of line requiring a § 1(18) certificate the same as if the carrier instead of utilizing trackage rights were to extend its own tracks. *Transit Commission* v. *U. S.*, 289 U.S. 121 (1933).

The contract between the Milwaukee and Ishpeming for the construction and operation of the connection does not contemplate any such arrangement (Applicants Ex. 4; R. 230-238, 114). The supplemental application made by them under § 5(2) of the Act to permit the use of the Ishpeming's main line by the Milwaukee locomotive returning to its own tracks after delivery of cars to the Ishpeming (R. 68-93) was properly dismissed by the Commission as unnecessary in view of the § 1(18) application (R. 291, 315). Such use is merely incidental to the interchange operation over the connection, and the statement of the North Western concerning "joint use of the involved tracks" (Appellant's Brief, page 16) can make it nothing more.

Although a connection between two railroads often is a prerequisite to the use of trackage rights, *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F. 2d 777 (C.A. 8, 1925), and, in such event, is within § 1(18) the same as the trackage rights thereby made possible, *Chicago, B. & Q. R. Co. Abandonment*, 261 I.C.C. 549, 267 I.C.C. 38 (1946), a connection may also be used only for interchange purposes as is Republic Junction. By citing trackage rights decisions in its Report (R. 299), the Commission overlooked the fact that its § 1(18) jurisdiction in such cases is based on the extension of a line of railroad to a new destination by running trains over the other railroad. This is the reason for the lower court's statement (R. 390) that cases involving trackage rights are not in point with the present litigation.

The North Western's reliance on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), is misplaced for the same reason,[8] and the North Western bases its criticism of the lower court's analysis of the *Alabama* case on its own erroneous statement of that case (Appellant's Brief, page 16).

On the first appeal of the case to the Mississippi Supreme Court, 131 Miss. 857, 868, 95 So. 733, 735 (1922), the decision stated:

> "It is further charged that, upon information and belief, the objects and purposes of the defendant in beginning the said eminent domain proceedings were not only to effect a junction of its road with the complainant's road, but designs and purposes to run its trains, locomotives, and cars over the main line of the complainant, . . . from the junction point to the city of Jackson . . ."

The Jackson and Eastern already had obtained a § 1(18) certificate authorizing its construction of an extension of its railroad to Jackson, *Public-Convenience Certificate to Jackson & Eastern Ry.*, 70 I.C.C. 110 (1921), but it intended to build its own tracks only to the place of connection with the Alabama because it was financially unable to build further. 136 Miss. 726, 740, 101 So. 553, 556. The President of the Jackson and Eastern testified that he expected his railroad to get to Jackson by obtaining the right to use the Alabama's tracks to that city. 136 Miss. at 738, 101 So. at 555.

El Dorado & W. Ry. Co. v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C.A. 8, 1925), also is not in point here because the extension of line it proscribed was to be accomplished

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[8] This case is also not in point here for the other reasons discussed herein at pages 19-28.

by utilizing trackage rights over another railroad for the through movement of trains. In both of these cases, unlike the operations over Republic Junction, trains were not to be broken apart at the connection, and interchange cars were not to be placed on a separate track. Over the instant connection there is no through train movement over another's line and not the remotest suggestion in the Record that the Republic Junction connection is, as the *Alabama* decision states at 271 U.S. 250, ". . . but a step toward the joint use of tracks."

Because no extension by means of trackage rights is involved in this litigation, the North Western's citation of trackage rights cases to support the Commission's § 1(18) jurisdiction over Republic Junction is not in point. In *Chicago, B. & Q. R. Co. Abandonment*, 267 I.C.C. 38, 38 (1946), the Commission had previously, 261 I.C.C. 549, issued § 1(18) permission to construct a connection ". . . for the purpose of facilitating the proposed operation under trackage rights . . ." over another railroad so that 53.15 miles of applicant's own line might be abandoned.

The proposal in *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 (1930), was to construct a two mile connecting track to supplant an interchange arrangement between two railroads via trackage rights over 1,000 feet of tracks belonging to a third road. We find no support in the Commission's Report in that case for the North Western's statement (Appellant's Brief, page 12) that a motion to dismiss the application was made, although the Commission observed at 166 I.C.C. 708 that some doubt had been expressed as to its jurisdiction. The Commission's § 1(18) jurisdiction was proper, however, because the arrangement would cost an excessive $600,000 and contemplated a 750-foot tunnel and rights of way across inter-

vening lands as well as the relocation of certain tracks of the carriers to be connected. No objection to the application was made, and the certificate issued.

Construction By D., G. H. & M. Ry., 124 I.C.C. 338 (1927), is similarly not in point because the 2.48 mile connecting line was to be used for through freight movements.

2. The Government Erroneously Equates "Through Routes" With "Extensions of a Railroad" to Justify the Commission's Jurisdiction Over Republic Junction.

The United States and the Commission argue to this Court, as they did in the court below, that the Republic Junction connection is within the holding of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), on the ground that new through routes made possible by the connection constitute the means of invasion. The establishment of new through routes, however, is not an extension of a line of railroad.

A through route is an arrangement between railroads for continuous joint transportation of freight from an origin on the line of one to a destination on the line of the other. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136, 139 (1917). The only condition precedent and only requirement under the Act for establishing a through route is the publication of an applicable rate in a tariff, constituting a holding out of the two carriers to provide the through transportation service. *Thompson* v. *United States*, 343 U.S. 549, 557 (1952). Although the Commission may compel establishment of through routes under § 15(3) of the Interstate Commerce Act (Appendix A, page 4a), subject to the limitations stated in § 15(4) of the Act (Appendix A, page 4a), Commission approval of their creation is unnecessary, and the Commission has no statu-

tory duty or power to police their institution by the voluntary undertaking of the parties thereto. *Denver & R. G. W. R. Co.* v. *Union P. R., Co.*, 351 U.S. 321, 327 (1956). Simply the movement of cars via the through route is sufficient to establish it. *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 563-564 (1952).

The Commission in this litigation would attempt to bring the voluntary creation of through routes within its power to permit or forbid under § 1(18) whenever any new track is required in order to create such route. Thus, by the Commission's reasoning, a new through route for the benefit of a shipper already served by the Milwaukee or Ishpeming would require the Commission's § 1(18) approval, even if it required the construction of only a short industrial spur to the shipper's plant. Such a track is manifestly a § 1(22) track over which the Commission otherwise would have no jurisdiction.

The Commission thus would enlarge its authority over through routes beyond that contemplated by either § 1(18) or § 15. This an administrative agency may not do. *Civil Aero. Bd.* v. *Delta Air Lines*, 367 U.S. 316 (1961); *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956).

The "invasion" ascribed to the Ishpeming and Milwaukee by the Government must exist under the *Texas* case quite apart from the presence or absence of new through routes made possible by the connection. Such an invasion does not exist, and through routes alone are not sufficient upon which to predicate a violation of § 1(18). Together, as the Commission puts them, they could only result in a confusion of § 15 with §§ 1(18)-(22) contrary to the intent of Congress in enacting those provisions as different sections of the Act.

3. Appellees' Improvement of Transportation Service Is Not An "Extension of Line" and Not Unlawful Because The Resulting Competition Attracts Traffic.

The Commission's conclusion that Republic Junction enabled the Ishpeming and Milwaukee to compete for new traffic (R. 298), and the implication that without the connection they could not do so, is an unwarranted confusion of "extension of a line of railroad" with an improvement in transportation service. The Commission's assumption was that increased competition made possible by the connection is unlawful because of the provisions of § 1(18) of the Act, and on this appeal the North Western and the Government join in advocating that view. They are mistaken; nothing is inherently unlawful in competing more successfully for traffic.

Sections 1(18) through 1(22) of the Interstate Commerce Act do not proscribe better and more efficient transportation service brought about by the improvement of transportation facilities merely because such improvement enables carriers to attract traffic from other railroads. These provisions of the Act concern only construction or abandonment of railroad tracks and, if within the ambit of § 1(22), they are exempt therefrom unless they "invade" another's territory under the doctrine of the *Texas* case even though they make competition among railroads keener.

Long Island Rail Road Co. v. *Deleware, L. & W. R. Co.*, 183 F. Supp. 319 (E.D. N.Y., 1960), emphasized the distinction between an extension of a "line of railroad" and of transportation service, and at page 324 the court stated:

> "What a railroad *does* is to carry or transport; the definition of transportation described the instrumentalities so employed; . . .

> "The interdiction of § 1(18) is directed to the expansion of a railroad, not to developments concerning the methods whereby the transportation function is performed arising from competition in that field."

The Commission adopted this distinction in *Absorption of Drayage and Trucking Charges,* 197 I.C.C. 675, 679-680 (1933), and held in *Arlington & F. A. R. Co., Extension of Operation,* 228 I.C.C. 479, 481-482 (1938), that "extension" under § 1(18) means an extension of the railroad itself, not of its appurtenant services.

In *Great Northern Ry. Co. Construction,* 166 I.C.C. 3 (1930), the Commission issued a § 1(18) certificate permitting construction of a 36-mile branch line. In a suit to set aside the order the plaintiff alleged that part of its railroad line would become useless because of the competition from the proposed branch. The three-judge court stated, in *Indian Valley R. R.* v. *United States,* 52 F. 2d 485, 487 (N.D. Cal., 1931), that the only loss would be a loss of traffic revenue due to a competing line and held that the right to be free from competition was only a privilege to be enjoyed so long as it existed; it was not an enforceable legal right.

Competition is not a factor in assessing whether the connection is within the Commission's § 1(18) jurisdiction or, under § 1(22), exempt from it.

Competition among railroads is not forbidden, and the fact that a carrier may suffer diversion of traffic as a consequence does not make it unlawful, even if such carrier be a small railroad in the Upper Penninsula of Michigan. *Escanaba & L. S. R. Co.* v. *U.S.,* 303 U.S. 315, 322-323 (1938). Apart from its bearing on the issue of public convenience and necessity raised by the § 1(18) applica-

tion (R. 24), economic injury from keener competition is not a factor to be weighed in this proceeding. *Commission* v. *Sanders Radio Station*, 309 U.S. 470, 473 (1940). The inquiry before the lower court was whether the connection is an extension or a § 1(22) track, and this does not encompass any question of economic injury.

Enlargement of appellee's transportation services by the Republic Junction connection, making more effective their competition for traffic which otherwise they could not transport, is wholly irrelevant and immaterial to whether the connection is, or is not, an "extension" of railroad line. Improvement of service cannot be equated with a § 1(18) extension of line of railroad.

II.

The Decision Below, Exempting Republic Junction From § 1(18) of the Interstate Commerce Act and the Commission's Jurisdiction Thereunder, Was a Proper Exercise of the Court's Function On Review to Construe § 1(18) and § 1(22) of the Act and Apply Them To the Jurisdictional Facts Found By The Commission.

We have considered it beyond serious doubt that, on review of an agency order assailed for exceeding the scope of the agency's delegated power, a court could inquire whether the agency had assumed jurisdiction in accordance with the pertinent statutes. The North Western, however, declares such an inquiry is not permissable because controlling weight must be accorded the Commission's finding as to its own jurisdiction. Describing the proceedings below as *de novo*, appellant argues the Commission's finding that it had § 1(18) jurisdiction over the connection was a factual finding within the sacrosanct realm of the Commission's expertise.

A. There Are No Grounds For Appellant's Assertions That The Proceeding Below Was De Novo.

The North Western contends the three-judge district court below tried and decided *de novo* the question whether the Republic Junction connection was an extension subject to the requirements of § 1(18) or a § 1(22) track exempt from the Commission's jurisdiction under that section. Throughout its Jurisdictional Statement and Brief appellant repeatedly refers to *de novo* proceedings, and the main thrust of its argument (Appellant's Brief, pages 17-31) is that such a *de novo* determination is improper in this case.

The term *"de novo"* means the complete disregard of any prior adjudication and a new determination as if there had been no previous litigation. *Pittsburgh S. S. Co.* v. *Brown,* 171 F. 2d 175 (C.A. 7, 1948); *American Fruit Growers* v. *S. T. Runzo & Co.,* 95 F. Supp. 842, 844 (W. D. Pa., 1951). In a *de novo* proceeding the evidence is heard and the facts found on which a new determination is made. *Crowell* v. *Benson,* 285 U.S. 22 (1932); *Spano* v. *Western Fruit Growers,* 83 F. 2d 150, 152 (C.A. 10, 1936). The district court did not conduct such a proceeding or make such a determination.

The opinion of the lower court lacks any implication whatever that its adjudication was *de novo* (R. 384-393). This phrase, so abundantly repeated in appellant's brief, is conspicuously absent from this opinion and from the decree entered pursuant thereto on June 18, 1963 (R. 393-396). The lower court heard no new evidence in the course of the proceedings before it, but tried the case on the record made before the Commission.

The complaint in this cause (R. 1-13) in paragraph one (R. 1-2) states the purpose of the lower court suit was

"to annul and set aside, and to enjoin the enforcement of" the orders of the Interstate Commerce Commission in the two Finance Dockets. Paragraph two (R. 2) alleges that jurisdiction of the action is conferred on the lower court by Title 28 U.S.C. § 1336; paragraph three of the complaint (R. 2) alleges the action was brought pursuant to Title 28 U.S.C. §§ 1398, 2284, 2321 through 2325, and to § 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009, (Appendix A, pages 10a-12a) which provides for judicial review of every final agency action and specifies the scope of such review. The opinion of the lower court acknowledged that its jurisdiction was based on the cited sections of 28 U.S.C. (R. 387). None of these provisions permit *de novo* proceedings; all are concerned with the procedures, methods and scope of judicial review. The Answer of the North Western in paragraph one admitted the allegations contained in paragraphs one, two and three of the complaint (R. 320, 321).

The Government and Commission evidently do not share the North Western's illusion that the lower court decided the matter before it *de novo*. Their Memorandum does not mention the term, and paragraph I of their answer similarly admits paragraphs 1, 2 and 3 of the Complaint (R. 317). Paragraph II of their answer alleges the action is one to review on order of the Commission based on the record made before the Commission (R. 317-318). The Government's and Commission's motion to dismiss a portion of the Complaint (R. 376, 377), moreover, acknowledges the presence before the district court of the same two issues described in its opinion (R. 387).

As the District Court observed (R. 387), the complaint presented ". . . two issues for determination: (1) Whether the Commission's finding that the Republic Junction track-

age constitutes an 'extension' within the meaning of Section 1(18) is correct; and if so, (2) whether the order of the Commission denying a certificate of public convenience and necessity is supported by substantial evidence." Both issues present reviewable questions, and both contemplate an examination of the record of the Commission proceedings to see whether the Commission has erred as a matter of law. *United States* v. *Maher*, 307 U.S. 148, 152 (1939); *United States* v. *Idaho*, 298 U.S. 105 (1936). The second issue was not adjudicated by the lower court because it was not necessary to do so in view of its decision on the first (R. 392). The first issue also does not contemplate the reception of new evidence and a new factual adjudication by the district court; rather, it is directed to an inquiry whether the Commission's assumption of jurisdiction in the matter before it was correct under the law. Indeed, the record before the lower court was the record before the Interstate Commerce Commission, portions of which constitute the transcript of record on this appeal (R. 14-317, 378-379).

This litigation before the lower court manifestly was not a *de novo* proceeding. The lower court based its decision, as it was required to do, on the evidence adduced before the Commission, *Tagg Bros.* v. *United States*, 280 U.S. 420, 443-444 (1930), and the Commission's interpretation of the law. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 168-169 (1962). Appellant's argument therefore is based on the completely false premise that the lower court decided the issues before it *de novo*. It did not; the proceeding was one to review the Commission's orders, and the lower court did precisely that.

The lower court's decision purports only to have reviewed the Commission's erroneous finding that Republic Junction is a § 1(18) extension. This finding was based upon the Commission's interpretation of the law applicable to its jurisdiction over such a matter on the authority of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), and the other decisions cited in its Report.[9] (R. 296-299). The district court decided that these cases and the reasons advanced by the Commission in support of its jurisdiction were not applicable to the jurisdictional facts found by the Commission, which are undisputed. (R. 388-392). The lower court's abundant discussion of the facts of record in the Commission proceedings can leave no doubt the Commission record was thoroughly reviewed. Whether this determination be characterized as "law-fact" or pure law, the result was that the Commission's error in applying the statutory and decisional law to the facts before it was laid bare and corrected. Correcting a Federal agency's errors of law clearly is a proper function of the court reviewing its orders. *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 144-145 (1940); *King* v. *United States*, 344 U.S. 254 (1952); *Public Serv. Comm.* v. *United States*, 356 U.S. 421 (1958).

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[9] *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga., 1957); *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540 (E.D. Mich., 1923); *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N.W. 809 (1926), on reargument, 167 Minn. 177, 213 N.W. 534 (1926); *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C.A. 8, 1925); *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 (1930); *Great Southwest Railroad, Inc., et al. Construction*, 295 I.C.C. 829 (1958).

B. Appellant Confuses Unassailable Facts Found By the Commission With the Jurisdictional Finding They Underlay and Mistakenly Says the Latter Is Not Reviewable.

The facts upon which the Commission's assertion of jurisdiction is based were found by it on the testimony adduced and the exhibits admitted at the hearing of the application and complaint cases (R. 93-279). They are undisputed, and the lower court of course could not purport to change or modify them. *Federal Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

But the North Western would clothe the Commission's conclusion deduced from such underlying facts with the same impregnability. Its argument places the Commission's jurisdictional finding or conclusion on the same level as the finding, for example, that the connection is 262 feet long. The law does not foreclose the inquiry of a reviewing court into a jurisdictional conclusion of the Commission as it prohibits any modification of its evidentiary findings. *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 208-209 (1940).

If a finding or conclusion of the Commission is affected by an error of law whereby its statutory jurisdiction is exceeded, the reviewing court must correct the error and annul the decision. *Acker* v. *United States*, 298 U.S. 426, 434 (1936); *Alton R. Co.* v. *United States*, 287 U.S. 229, 238-239 (1932). Such a function is imposed upon reviewing courts by section 10(*e*) of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009(e), (Appendix A, pages 10a-12a), which governs judicial review of agency orders, including those of the Interstate Commerce Commission. *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S. 173 (1959). This statute provides that

". . . the reviewing court shall decide all relevant questions of law. . ." and set aside agency action ". . . not in accordance with law; . . ."

If an administrative tribunal has misconceived the law, its decision cannot stand. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

The decision of the lower court thus corrected the Commission's erroneous interpretation of the law relating to its jurisdiction over Republic Junction just as errors of law as to the adequacy of findings and sufficiency of evidence may be corrected. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962); *Interstate Commerce Comm.* v. *J-T Transport Co.*, 368 U.S. 81 (1961). Regardless of the proper scope of the lower court's function or the weight to be accorded the Commission's determination, it can hardly be questioned, as does appellant in this appeal, that such review was proper in this litigation.

C. The Question of the Commission's § 1(18) Jurisdiction Decided Below Is One of Statutory Construction For the Court, Not the Commission, to Finally Decide.

The North Western contends that the same standards governing judicial review; for example, of the denial of a public convenience and necessity certificate on the merits, *United States* v. *I.C.C.*, 337 U.S. 426 (1949); *Columbia System* v. *U.S.*, 316 U.S. 407 (1942); *Fed. Power Comm'n* v. *Pacific Co.*, 307 U.S. 156 (1939), are appropriate on review of the Commission's assumption of jurisdiction over Republic Junction under § 1(18). In the former class of cases the expertise of the agency, if supported by substantial evidence and not arbitrary, must be accorded full effect, *Federal Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *New York* v. *United States*,

331 U.S. 284 (1947), because the matter is one within the Commission's specialized knowledge.

In contrast, however, the issue decided by the lower court, that the connection is exempt from the Commission's § 1(18) jurisdiction by the operation of § 1(22), presents a problem, not of what is the fact the evidence shows, but rather, which of the two Federal statutes applies to the evidentiary facts found. The construction of the statute determines whether initially the Commission has power to exercise its administrative expertise over the subject matter of the application presented to it. The lower court did not set aside the order of the Commission for error or irregularity as to any matter within the scope of its delegated power to determine; it denied the jurisdiction of the Commission to act at all. *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958).

In *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, 272 (1926), the Court paraphrased an argument of counsel which anticipated the North Western's argument on this appeal by 38 years:

> "It is argued that the issue whether tracks constitute an extension presents an administrative question; that the Commission has power to decide it, because Congress, by conferring authority to determine whether an extension is compatible with the public interest, has by implication conferred authority to determine also the subordinate question whether a proposed track constitutes an extension; . . ."

This Court rejected this contention because the Commission's function under § 1(18) is comparable to a determination of the propriety of a rate or rule and that of a court is to construe a statutory provision and apply it to the facts. The lower court in this litigation did no more than this, and this Court has often affirmed that

such statutory construction is a proper exercise of the judicial power to review Commission orders.

United States v. *Idaho*, 298 U.S. 105 (1936), is particularly in point since it involved an appeal from a commission order authorizing an abandonment under § 1(18). On the precise question here in issue, whether a track is within § 1(18) or § 1(22), this Court said at 298 U.S. 109-110:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or state commission.
>
> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction . . . Here, the jurisdiction of that Commission was challenged."

In this case the Commission had issued a § 1(18) certificate permitting abandonment of a track to a mine. The State of Idaho sued to annul and enjoin the order on the ground the track was a § 1(22) spur track, and the three-judge court agreed. On appeal this Court affirmed. In this litigation also the Commission and Government argued that the findings and order of the Commission were conclusive because made on substantial evidence. This Court, as it did in the *Texas* decision, held that the question is one of jurisdiction for the Court, 298 U.S. 109.

The decision in *Piedmont & Nor. Ry.* v. *United States*, 280 U.S. 469, 476 (1930), observed.

> "The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute."

This suit was an appeal from a Commission order overruling a motion to dismiss a § 1(18) application on

the ground the interurban exemption of § 1(22) applied to the new construction and denying the certificate sought. The lower court held the construction was an extension and dismissed the complaint. This Court affirmed because the Commission's order was negative.[10] In *Powell* v. *United States*, 300 U.S. 276, 287 (1937), this Court emphasized that the decision of such a question is a matter of statutory construction for a court, not an administrative one such as whether the project is in the public interest.

Regardless of the current status of the so-called "law-fact formula" (Appellant's Brief, page 30), the business of construing a statute is within the domain of a court of law, and not exclusively within the area of the Commission's administrative expertise. *Texas* v. *United States*, 292 U.S. 522 (1934), construed § 5 of the Interstate Commerce Act and decided the scope of the Commission's authority under it, and the decision in *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, 544 (1940), declared that:

> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."

This Court again construed § 5 of the Interstate Commerce Act on an appeal from a Commission order and applied the statute to the facts of the case before it in *United States* v. *Marshall Transport Co.*, 322 U.S. 31 (1944).

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[10] The "negative order" doctrine, of course, is no longer a guiding rule. *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 143 (1939); *United States* v. *I.C.C.*, 337 U.S. 426, 432-433 (1949).

Labor Board v. *Highland Park Co.*, 341 U.S. 322 (1951), was a suit to enforce an order of the Board assailed as beyond its power. This Court stated at page 325:

> "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct."

Federal Communications Comm. v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953), held that an agency disposition based upon the agency's view of a principal it derived from a statute, and not on matters within its own special competence, left for the court the construction of the statute and the determination of the governing principal.

Thus, where an agency disposes of a proceeding on the basis of what it deems to be the judicial view of the matter rather than by factors within its special competence, the court is not precluded from making its own independent judgment as to how the statute applies to the facts. *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960); *American Trucking Assns.* v. *U. S.*, 364 U.S. 1, 13-14 (1960). Where, as here, the question related to the jurisdiction of the Commission as opposed to that of a state agency, this Court construed and applied to the facts of the matter the mutually exclusive provisions of § 13a(1) and § 13a(2) of the Interstate Commerce Act,[11] in *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963).

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[11] Sec. 5 of the Transportation Act of Aug. 12, 1958, P.L. 85-625, 72 Stat. 571, 49 U.S.C. § 13a.

The North Western's argument that the lower court should have accepted the agency's findings as to its jurisdiction is untenable and wholly inconsistent with the function of the District Court on review of the question presented in this litigation to construe and apply § 1(18) and § 1(22) to the jurisdictional facts at bar. The courts, not the Commission, possess the specialized knowledge and the necessary expertise, and have the power and duty, to construe Federal statutes.

D. It Is For the Courts, Not the Commission as Appellant Contends, To Determine the Scope of the Commission's Jurisdiction.

Appellant contends that the lower court erroneously failed to accord proper weight to the Commission's finding that it had § 1(18) authority over the connection and that the Commission's findings should not be set aside except for an abuse of discretion or the lack of substantial supporting evidence. This theory elevates those findings to a status out of harmony with the law governing administrative tribunals. The jurisdiction of the Commission was delegated to it by Congress and extends no further than such delegation. It must be found within "the four corners of the statute" and the determination thereof is a judicial function for the courts—not the Commission. For the Commission itself to adjudicate the bounds of such delegation is unthinkable unless its expertise extends beyond administrative functions into the realm of constitutional law.

Had Congress presumed to delegate expressly to the Commission the power to make the final determination in §§ 1(18)-1(22) matters so as to preclude judicial in-

quiry into its jurisdiction, there would be serious doubt whether the statute would be constitutional because contrary to § 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009 (Appendix A, pages 10a-12a). *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955).

St. Joseph Stock Yards Co. v. *U.S.*, 298 U.S. 38, 51 (1936), held that the legislature may endow an agency with power to find facts, in which case judicial scrutiny goes no further than to ascertain whether evidence supports the findings, and questions of the weight of the evidence are left to the agency; but that just as direct legislative action is subject to judicial review, judicial inquiry cannot be precluded by a legislative delegation to an agency of the power to make "final" findings. *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956). An agency may not decide the limits of its own power. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368 (1946).

The scope of the statute giving the Commission its authority to act is decisive of the question whether it has acted within its jurisdiction, and in this case § 1(22) is a limitation on the scope of the Commission's jurisdiction. *Connecticut Co.* v. *Power Comm'n*, 324 U.S. 515, 526-531 (1945). In this case the Federal Power Commission had asserted power to regulate the accounting practices of a power company which challenged the Commission's jurisdiction over it pursuant to the exemption of § 201(a) of the Federal Power Act of Aug. 26, 1935, c. 687, 49 Stat. 847, 16 U.S.C. § 824(a). The Court construed the statute and pronounced the limits it placed upon the power of the Commission, and held the power company was exempt.

Such construction was no intrusion upon the legislative power. *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618 (1944).

The Commission agrees that the question whether a track is a § 1(18) extension or a § 1(22) track is one for the ultimate determination of a court, not of the Commission. In *Leelanau Transit Co. Abandonment, Northport Branch*, 307 I.C.C. 95, 102 (1959), it stated:

> "The Supreme Court of the United States has held that whether trackage is a 'spur' is a mixed question of law and fact left by Congress to the decision of a competent court, not to final determination of either the Federal or a State commission."

This decision at the same page also observed that the Commission must make a finding as to its own jurisdiction in the first instance. We do not contest this necessity and understand *Yonkers* v. *United States*, 320 U.S. 685 (1944), as requiring it. But we cannot ascribe to these cases any implication removing from judicial scrutiny on review the finding so made.

There can be no question of a courts' power on review to determine whether an agency has acted within its authority and the proceeding need not be *de novo* to be judicial. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 278 (1933); *Rochester Tel. Corp.* v. *U. S.*, 307 U.S. 125, 133-134 (1939). The North Western contends for a state of affairs condemned in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 136 (1951), which would permit the Commission to make findings plainly outside the scope of its authority and then to invoke a theory of an unassailable administrative construction to protect its claim of jurisdiction. Regardless of the weight to be accorded the Commission's assertion of § 1(18) jurisdictoin over the connection at Republic Junction, administrative construc-

tion of the statute delegating that jurisdiction "never has been carried so far as to permit administrative discretion to run riot." 341 U.S. 138. In the instant appeal the Commission should not be permitted to declare § 1(18) jurisdiction over railroad tracks the court below has held are exempt therefrom under § 1(22) of the Act.

E. Appellant's "Keystone" Case, Shields v. Utah Idaho R. Co., Is Not In Point With This Appeal Because, Here, the Lower Court Did Not Decide a Matter Delegated Exclusively To the Commission As It Did In Shields.

This court's holding in *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177 (1938), that the district court had no jurisdiction in *de novo* proceedings to issue an injunction restraining attempts to enforce an order of the Mediation Board requiring the railroad to comply with § 151 of the Railway Labor Act, added by sec. 1 of the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. § 151, (Appendix A, pages 7a-10a) is no authority in this case for appellant's contention, because the lower court here did not decide *de novo* the question before it. That case is also distinguishable from this in that the determination there made by the Interstate Commerce Commission was pursuant to the Congressional mandate of § 151 of the Railroad Labor Act, committing to the Commission the duty, as this court described it at 305 U.S. 180, 181, to determine conclusively a fact question in accordance with procedural due process, not under the Interstate Commerce Act, but under the cited provision of the Railway Labor Act, which determination in turn would provide a factual basis for action by the Mediation Board. Thus, in that case the Commission decided a matter expressly com-

mitted to its administrative judgment, it did not decide a question of statutory construction whether the railroad involved was exempt or not from Commission jurisdiction. Its factual determination in the *Shields* case decided only whether the railroad was exempt as an interurban electric railway from the jurisdiction of the Mediation Board pursuant to the Railway Labor Act.

The case held that because the delegation by Congress of this fact finding function to the Interstate Commerce Commission was valid and because procedural due process had been observed in making the determination, the determination had become binding on both the railroad and the Mediation Board. In contrast, the question before the lower court in this case was whether the Commission had properly asserted its own jurisdiction over the tracks. There is nothing in §§ 1(18) through 1(22) expressly committing such a judicial adjudication to the Interstate Commerce Commission. None of the cases cited by the North Western (Appellant's Brief, pages 17-31) hold that the Interstate Commerce Commission has been delegated the exclusive responsibility to construe sections of the Interstate Commerce Act here involved.

United States v. *Jones*, 336 U.S. 641 (1949), similarly held the court of claims had no jurisdiction to exercise a function expressly committed to the Interstate Commerce Commission. This was a rate making case arising under the Railway Mail Pay Act of July 28, 1916, c. 261, 39 Stat. 425, 39 U.S.C. §§ 523-568. The court of claims had awarded a money judgment by way of increased compensation for carrying government mail after the Interstate Commerce Commission had twice denied the railroad an increase in

pay for this service, as this court observed in *United States* v. *Griffin*, 303 U.S. 226 (1938). The Court held in the *Jones* case that the Railway Mail Pay Act delegates to the Commission exclusive jurisdiction to fix reasonable rates for rail carriage of mail and that such a determination is essentially legislative, not judicial. 336 U.S. 652. Thus this Court decided that the court of claims had intruded upon the domain reserved exclusively to the Commission by disregarding the expert informed contrary judgment of the Commission in matters committed to its special competence, 336 U.S. 641, and had reversed as errors of law matters of fact and expert judgment, not legal questions as were before the lower court in the instant litigation.

United States v. *Drum*, 368 U.S. 370 (1962), similarly concerns an instance of express Congressional delegation to the Commission of the power to make a final and exclusive factual decision. That case arose out of a Commission investigation pursuant to § 204(c), Part II of the Interstate Commerce Act, sec. 204(d) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 547, 49 U.S.C. § 304(c), as amended (Appendix A, page 6a), to determine whether certain carriers were contract carriers subject to § 209(a) of the Act, sec. 209(a) of the Motor Carrier Act, 49 Stat. 552, 49 U.S.C. 309(a). (Appendix A, pages 6a-7a). Section 204(c) specifically authorizes the Commission to make such an investigation and decide whether a motor carrier has failed to comply with any provision of Part II. Such an investigation does not lead to an order judicially reviewable since it is only preparation for future action by the Commission. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 310 (1927).

The resolution of the question in the *Drum* case depended, not upon the application of the statute as does

the question whether the Commission has jurisdiction under § 1(18), but upon the facts which the administrative tribunal, not a court, has the necessary expertise to appraise. The Commission thus decided only a matter clearly within the scope of its mandate and lawful by the same standards any issue of public convenience and necessity is lawful under Part I of the Interstate Commerce Act.

In *State of Illinois* v. *United States,* 213 F. Supp. 83 (N.D. Ill., 1962), affrmed *per curiam,* 373 U.S. 378 (1963), the district court upheld the Commission's § 1(18) jurisdiction to authorize abandonment of operations of the Chicago, North Shore & Milwaukee Railway against the contentions of the State of Illinois that the railway was exempt under the interurban provision of § 1(22) from the Commission's jurisdiction. Prior decisions of this Court had held that the railway was within the interurban exemption of § 20a of the Interstate Commerce Act, and that it had been so decided pursuant to § 151 of the Railway Labor Act and under § 77 M of the Bankruptcy Act. In denying the state's claim of exemption pursuant to § 1(22) the district court stated at 213 F. Supp. 87-88:

> "It is apparent from the decisions following the Supreme Court North Shore case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case."

Thus the exemption of § 1(22) is not to be read in *pari materia* with similar exemptions in other acts. Appellant's reliance on this case is at odds with its reliance on the

Shields case in that the *State of Illinois* decision holds that the decisions of the Commission under § 151 of the Railway Labor Act are not authority for decisions under §§ 1(18)-1(22) of the Interstate Commerce Act.

III.

The Outright Reversal of the Lower Court Sought By the North Western In This Court Is Neither an Appropriate Nor a Complete Remedy.

The North Western requests this Court to reverse the decision of the lower court but does not suggest, in that event, that a remand would be proper. The North Western therefore fails to consider that the lower court decided only one of the two issues presented to it (R. 392), that the Commission had no jurisdiction to permit or forbid operations over Republic Junction. In the event this decision must be reversed, which we do not believe, there remains pending the second issue whether the findings and conclusions of the Commission are supported by substantial evidence of record (R. 387-392). Reversal of the judgment of the lower court thus would require remand of the cause to the District Court for the Eastern District of Wisconsin so that the remaining issue of the propriety of the Commission's denial of the application for a § 1(18) certificate could be adjudicated. *Western Pacific* v. *South. Pac. Co.*, 284 U.S. 47 (1931).

CONCLUSION

For the reasons stated herein, the three-judge District Court properly set aside the Commission's order on the ground Republic Junction was a § 1(22) track outside the Commission's § 1(18) jurisdiction. The judgment below should be affirmed.

Respectfully submitted,

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September 23, 1964

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois the 23d day of September, 1964.

FRANK M. LONG

APPENDIX A

Texts of Pertinent Statutes Cited Herein

I. Interstate Commerce Act, Part I:

Sec. 1(18): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U.S.C. § 1(18); as amended:

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Sec. 1(20): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(20):

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad,

or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Sec. 1(21): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(21):

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the

expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Sec. 1(22): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(22):

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Sec. 3(4); sec. 405 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 479, 49 U.S.C. § 3(4), as amended:

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Sec. 15(3), as amended by sec. 10(b) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 911, 49 U.S.C. § 15(3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Sec. 15(4), as amended by sec. 10(b) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 911, 49 U.S.C. § 15(4):

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) re-

quire any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

II. Interstate Commerce Act, Part II:

Sec. 204(c); sec. 204(d) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 547, 49 U.S.C. § 304(c), as amended:

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Sec. 209(a); sec. 209(a) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 552, 49 U.S.C. § 309, as amended:

> "Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in

furnishing seasonale service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States."

III. Railway Labor Act of May 20, 1926:

Sec. 1; sec. 1 of the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. § 151; as amended:

"Section 1. When used in this Act and for the purposes of this Act—

First: The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

"Seventh. The term 'district court' includes the United States District Court for the District of Columbia; and the term 'court of appeals' includes the United States Court of Appeals for the District of Columbia.

"This Act may be cited as the 'Railway Labor Act.'"

IV. Administrative Procedure Act of June 11, 1946, c. 324:

Sec. 10, 60 Stat. 243, 5 U.S.C. § 1009:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess

of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.